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CITATIONS

Cases:

Florida Power & Light Company v. International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820 and 1263 and NLRB, No. 73-556 in this Court	6
Frito Company v. NLRB, 330 F.2d 458 (9th Cir. 1964)	7, 10
NLRB v. Allis-Chalmers Manufacturing Company, 388 U.S. 175	4, 6

Decision and Order of the National Labor Relations Board is reported at 192 NLRB No. 17, and appears at App. Pet. 26a. The opinion of the panel of the Court of Appeals dated September 22, 1972, not yet officially reported, appears at App. Pet. 41a. The opinion of the Court of Appeals for the District of Columbia Circuit, sitting *en banc,* dated June 29, 1973, appears at App. Pet., 95a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does a Union restrain or coerce an employer in the selection of its collective bargaining or grievance adjustment representatives, in violation of Section 8(b(1)(B) of the National Labor Relations Act, by disciplining foremen-members for performing rank-and-file employees' work during a lawful strike against their employer, and for forming a protective association to advance the alleged rights of the foremen during the course of that strike?

2. Whether the Trial Examiner, affirmed by the National Labor Relations Board, abused his discretion by denying the charging party's motion, made at the conclusion of the hearing before him, to amend the complaint issued by the Labor Board's General Counsel, where the proposed amendment would have raised a different issue involving a separate section of the Act from that tried before the Trial Examiner, and where the General Counsel not only did not consent to the proposed amendment, but had previously refused to issue a complaint on a separate charge filed

by the same charging party raising the same issue encompassed by the proposed amendment?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C. §151, *et seq.*, Sections 2(3), 2(11), 8(b)(1) and 14(a), are set forth at App. Pet. 180a-184a.

STATEMENT OF THE CASE

The principal facts are essentially undisputed and are accurately set forth in the decision of the Labor Board. In brief, Local 134 has been in contractual relationship with Illinois Bell Telephone Company and its predecessors since approximately 1909. It represents within its bargaining unit both employees as defined in Section 2(3) of the Act and foremen and general foremen found by the Board to be supervisors within the meaning of Section 2(11) of the Act. In all contracts since 1948, these foremen, as well as all other employees covered by the contract, have been required, as a condition of employment, to become and remain members of the Union after 30 days of employment. (J.A. 175-179.)[2] All IBEW members, including the foremen, take an oath of obligation to conform to and abide by the IBEW Constitution and to bear allegiance to the IBEW and its interests. (J.A. 187, 206.)

From May 8, 1968 until September 20, 1968, members of Local 134, and other local unions affiliated with the IBEW, were engaged in a lawful economic strike against Illinois Bell Telephone Company. In the

[2] References to "J.A." are to the Joint Appendix filed by the parties with the Court below.

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below affirmed the Board on that issue, with a modification not here pertient, by a 2-1 vote, and unanimously affirmed the denial of the motion to amend. On rehearing, *en banc,* the Court of Appeals reversed the Board's finding of a violation of Section 8(b)(1)(B), by a 5-4 vote.[3]

ARGUMENT

1. RESPONDENTS DO NOT OPPOSE THE GRANTING OF A WRIT OF CERTIORARI IN QUESTION NO. 1.

It is the position of Respondents that the decision of the Court of Appeals is clearly correct, in that it correctly interprets both the language of the Act and the pertinent legislative history and does so in a manner consistent with this Court's decisions in *NLRB* v. *Allis-Chalmers Manufacturing Company, supra.,* and *Scofield* v. *NLRB,* 394 U.S. 423. Nevertheless, Respondents recognize that this question presented is one of major importance in the administration of the National Labor Relations Act, and is one on which the Courts of Appeals have divided. The result below is

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[3] On rehearing, *en banc,* the Court consolidated the instant case with that of *IBEW Locals 641, 622, 759, 820 and 1263* v. *NLRB and Florida Power and Light Company.* A Petition for a Writ of Certiorari, filed by Florida Power and Light Company, is presently pending before the Court as No. 73-556. Although the question presented in that case is the same as that presented by Question No. 1 in the instant case, the statement of the question presented at page 2 of the Petition there is imprecise. Thus, as the Question Presented by Petitioner herein correctly states, the issue is whether a union may discipline foremen-members for performing *rank-and-file employees' work* during a strike; not whether the union may discipline supervisors, who are union members, who perform "Company" work during a strike. (Page 2 of Petition in No. 73-556.)

the same as that reached by the United States Court of Appeals for the Ninth Circuit, *NLRB* v. *San Francisco Typographical Union No. 21,* F.2d , 83 LRRM 2314 (May 18, 1973). On the other hand, the United States Court of Appeals for the Seventh Circuit reached the opposite result, affirming the holding of the Labor Board on the same issue in a companion case and declining to follow the majority *en banc* opinion of the D.C. Circuit. *NLRB* v. *Local 2150, International Brotherhood of Electrical Workers, AFL-CIO,* F.2d , 83 LRRM 2827 (July 13, 1973).[4]

Under the above circumstances, the Respondents agree that review by this Court of Question No. 1 would be appropriate.

2. THE WRIT SHOULD BE DENIED ON QUESTION NO. 2.

A. There Is No Conflict of Decision Among the Courts of Appeals.

It is sufficient to note that, not only is there no conflict between the Courts of Appeals on Petitioner's Question No. 2, the Petition does not even contend that such a conflict exists. Indeed, as shown in Part C, *infra.*, the decision of the Court of Appeals for the District of Columbia Circuit is in accord with two of the principal cases cited by Petitioner, *NLRB* v. *Sterling Furniture Company,* 202 F.2d 41 (9th Cir. 1953), and *Frito Company* v. *NLRB,* 330 F.2d 458 (9th Cir. 1964).

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[4] We are advised by counsel for IBEW Local 2150 that they intend to file a Petition for a Writ of Certiorari to the Seventh Circuit in that case. Following the Seventh Circuit's denial of a motion for rehearing, *en banc,* the petition in that case will be due early next month.

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Nor do *Sterling Furniture Company* or *Frito Company, supra,* support Petitioner's position. In *Sterling,* the General Counsel joined in the proposed amendment. Here, Counsel for the General Counsel did not join or consent to the Association's motion to amend the complaint. Further unlike this case, the legality of the contract there was in issue throughout the case. In *Frito,* the General Counsel raised no objection to the amendment, which was a narrow one: the inclusion of two additional, and interrelated, subsections of a single subcontracting clause in the allegation that the other subsection of the same clause violated Section 8(e) of the Act. Indeed, the Court in *Frito* specifically noted that, in the circumstances of that case, the amendment of the complaint would not have usurped the authority of the General Counsel. Here, that would have been the precise effect of the granting of the Association's motion. As the Court added in *Frito*:

> "It is well established that the Board is not empowered to allow amendments to the complaint which the General Counsel has rejected. These are amendmnts proposed by other parties than the General Counsel and were it possible for them to impose amendments to the complaint, the final authority of the General Counsel to issue complaints would be circumvented. The authority to issue complaints is authority to determine what they shall contain." (330 F.2d at 464.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari on Question No. 2 should be denied. The Petition for a Writ on Question No. 1 is not opposed.

Respectfully submitted,

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